IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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The State of Florida, Respondent, files this response and moves that the writ of certiorari be denied.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 379 So.2d 97 (Fla. 1980), and is set out in Petitioner's Appendix A.

JURISDICTION

The opinion of the Supreme Court of Florida was filed November 21, 1979, and is set out in Petitioner's Appendix A. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR A STATEMENT OF PARTICULARS OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE STATE WOULD RELY, INFRINGING UPON PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHTS OF DUE PROCESS OF LAW AND NOTICE OF THE CHARGES AGAINST HIM.

II.

WHETHER THE TRIAL COURT CAN DEFINE AND CONTROL THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL AT THE EXPENSE OF HIS SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND AN IMPARTIAL JURY BY PERMITTING, OVER OBJECTION, THE PRESENCE OF THE ELECTRONIC MEDIA AT HIS TRIAL.

III.

WHETHER THE TRIAL COURT ERRED IN DENYING THE INDIGENT PETITIONER'S MOTION FOR APPOINTMENT OF AN EXPERT PSYCHIATRIST TO AID THE DEFENSE IN THE PREPARATION OF ITS CASE REGARDING THE PETITIONER'S GUILT AND REGARDING POTENTIAL MITIGATING CIRCUMSTANCES, THEREBY DENYING THE PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

STATEMENT OF THE CASE

The facts are sufficiently set forth in the Petition for Writ of Certiorari filed in this Honorable Court (Petition at pages 3-4) and will not be repeated here.

REASONS THE WRIT SHOULD NOT BE GRANTED

I.

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR A STATEMENT OF PARTICULARS OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE STATE WOULD RELY, INFRINGING UPON PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHTS OF DUE PROCESS OF LAW AND NOTICE OF THE CHARGES AGAINST HIM.

(A.) The decision of the Florida Supreme Court is in accord with federal decisions.

The issue which petitioner raises is not new. It has been raised before. In Spenkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1972), cert. den. 440 U.S. 976, the same contention was made. The Fifth Circuit said, inter alia:

> Spenkelink cites no case, federal or state, which requires the prosecutor to list in the indictment the aggravating circumstances on which he will rely in seeking the death penalty.
>
> * * * *
>
> As for Spenkelink's contention that he had no other notice of the aggravating circumstances on which the State would rely or which the trial would consider, we need only point to Fla.Stat.Ann. § 921.141(5), which defines the aggravating circumstances that may be considered by both judge and jury.
>
> (Text at 609-610)

The Fifth Circuit decided Spenkelink in 1978. Petitioner does not bring to the Court's attention one case decided

since, which conflicts with that decision.

Petitioner's reliance on Brady v. Maryland, 373 U.S. 83 (1963) and Gardner v. Florida, 430 U.S. 349 (1977) is misplaced. In Brady, the Court held that it was a denial of due process for the prosecution to fail to disclose material exculpatory matter to the defense. Petitioner did not seek exculpatory matter. He sought particulars as to the aggravating circumstances which the State would rely upon in seeking the death penalty. But, the Court has already held that there is no general constitutional right to discovery in a criminal case. Weatherford v. Bursey, 429 U.S. 545 (1977).

In Gardner the Court held that it was a denial of of due process to impose the death penalty, at least in part, on the basis of confidential information which was not disclosed to the defendant or his counsel. No such thing occurred in the instant case.

(B.) Florida's Death Penalty Statute sufficiently apprises a defendant as to the aggravating circumstances.

Section 921.141(5), Florida Statutes (1975), (A-1), sets out eight (8) aggravating circumstances. Under Florida Law only statutory aggravating circumstances may be considered in the weighing process. Elledge v. State, 346 So.2d 998 (Fla. 1977). When in the State of Florida a defendant is charged with a capital offense, he is on notice by virtue of the indictment, that he may face the supreme penalty if the court finds at least one of the enumerated statutory aggravating circumstances to exist. Of those eight (8), the first two relate to historical facts of which the defendant himself has personal knowledge and should require no particulars. The last six (6) relate to the crime for which the defendant has been convicted, evidence of which the defendant and his counsel heard in detail from the witnesses during the guilt phase of the trial.

II.

WHETHER THE TRIAL COURT CAN DEFINE AND CONTROL THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL AT THE EXPENSE OF HIS SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND AN IMPARTIAL JURY BY PERMITTING, OVER OBJECTION, THE PRESENCE OF THE ELECTRONIC MEDIA AT HIS TRIAL.

(A.) Certiorari should be denied because the issue raises matters *DEHORS* the record.

In essence, Petitioner is asking the Court to grant certiorari to determine matters *DEHORS* the record. This is so because he contends that, ". . . his counsel was especially unnerved by the camera's presence," and that ". . .the position of the camera being conspicuously located to the jury may have had some impact on the jury's analysis of the trial evidence." (Petition, P. 8)

There is no constitutional right to compel a private trial. Singer v. United States, 380 U.S. 24 (1965). Recognizing this, Petitioner endeavors to convince the Court to grant certiorari by asserting that his rights to effective assistance of counsel and an impartial jury were compromised by the presence of the cameras in the courtroom. Here again, as with respect to Issue III herein, the determination of this issue involves factual matters which are *DEHORS* the record; viz: whether in fact the camera affected his counsel's competence and whether it affected the jury's impartiality? Cardinale v. Louisiana, 394 U.S. 437 (1969).

III.

WHETHER THE TRIAL COURT ERRED IN DENYING THE INDIGENT PETITIONER'S MOTION FOR APPOINTMENT OF AN EXPERT PSYCHIATRIST TO AID THE DEFENSE IN THE PREPARATION OF ITS CASE REGARDING THE PETITIONER'S GUILT AND REGARDING POTENTIAL MITIGATING CIRCUMSTANCES, THEREBY DENYING THE PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

(A.) The judgment of the Supreme Court of Florida in denying Petitioner's contention under this issue was based on an independent and adequate State ground.

The decision of the Florida Supreme Court reveals that Petitioner raised the psychiatric issue in that Court via two separate contentions: one, that the trial court should have granted Petitioner's request for a psychiatrist in order that the defense might determine whether a possible defense of insanity existed; two, that he was entitled to the appointment of a psychiatrist to assist him in establishing extreme mental or emotional disturbance as a mitigating circumstance. Both of these contentions were denied by the Supreme Court of Florida on adequate State grounds.

The first was denied because Petitioner was attempting to circumvent Florida Rule of Criminal Procedure 3.210(3), (A-2, A-2a). The second was denied because no such request was made to the trial court. In Florida, an issue not raised in the trial court cannot be raised on appeal for the first time. Yost v. State, 243 So.2d 469 (Fla. 3d DCA 1971). The

grounds raised upon appeal must be the same as those relied upon at trial. Bertone v. State, 224 So.2d 400 (Fla. 3d DCA 1969).

(B.) The state of the record will be inadequate for this Court to properly consider the issue raised.

In Cardinale v. Louisiana, 394 U.S. 437 (1969), the Court held that, via certiorari, it will not decide a federal question that had not been raised, preserved or passed upon in the State court because, inter alia, questions not properly raised in the trial court will not be supported by an adequate record. Petitioner now contends that the denial of a "work product" psychiatrist denied him due process and equal protection of the laws. The Circuits are in general accord that denial of State-provided expert assistance does not violate due process or equal protection unless there is a showing that the assistance of an expert is necessary and that the defendant is unable to hire his own experts. Pedrero v. Wainwright, 590 F.2d 1383 (5th Cir. 1979). At least one Circuit also holds that a defendant must show prejudice in the denial. Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974). Unless the Court has an inclination toward holding that the denial of expert assistance constitutes a violation of due process or equal protection of the laws, even absent a showing of necessity or prejudice, this case is not in a proper posture for decision because, aforesaid, the issue was not properly preserved below.

CONCLUSION

Therefore, Respondent respectfully asks this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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